Petition

81-196

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

ANTHONY GIACALONE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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QUESTION PRESENTED

Whether it is fundamentally unfair and constitutionally impermissible to permit and consider strictly hearsay evidence of a defendant's alleged involvement in organized crime at a defendant's sentencing hearing, thereby depriving the defendant of the right of due process and confrontation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner Anthony Giacalone respectfully prays that a writ of certiorari issue to review the judgment and statement opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on May 18, 1981.

OPINION BELOW

The writ prayed for herein is to

review Paragraph Six of the statement opinion of the Court of Appeals for the Second Circuit, rendered on May 18, 1981, which is not reported and is reprinted in the Appendix hereto, p.1a, infra.

JURISDICTION

The petitioner Anthony Giacalone, on December 22, 1980, received a sentence of imprisonment and fine by the United States District Court for the Southern District of New York, following a jury conviction on various charges stemming from the embezzlement of funds from Citibank, N.A. The judgment of conviction was affirmed on appeal by the Court of Appeals for the Second Circuit on May 18, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1).

QUESTION PRESENTED

1. Whether it is fundamentally unfair and constitutionally impermissible to permit and consider strictly hearsay evidence of a defendant's alleged involvement

in organized crime at a defendant's sentencing hearing, thereby depriving the defendant of the right of due process and confrontation.

STATEMENT OF THE CASE

The petitioner Giacalone, with three others, was charged in a sixteen count indictment as follows:

(1) Count I alleged a conspiracy among all the four defendants and others to embezzle funds from Citibank, N.A., to transmit the embezzled funds in interstate and foreign commerce, and to distribute the funds among themselves in violation of 18 U.S.C. Sections 656, 1005, 1343, 2314 and 2315.

(2) Counts Two and Three charged Joseph and Joey Arnao with aiding and abetting Citibank employee, John Palacio, in the embezzlement of three-million dollars and the entry of a false statement in a bank record, in violation of Title 18 United States Code, Sections 656 and 1005, respectively.

(3) Counts Four through Nine charged various of the four defendants with using international wire facilities to facilitate a fraudulent scheme, in violation of Title 18, United States Code, Section 1343.

(4) Counts Ten through Twelve, and Counts Thirteen through Sixteen charged petitioner and defendant Anthony DePasque with the crimes of transporting and receiving or distributing, respectively, stolen funds, in violation of Title 18, United States Code, Sections 2314 and 2315.

The case came on for trial before District Judge Robert Sweet and a jury on August 25, 1980. On October 10, 1980, the jury returned a verdict of guilty on all counts against petitioner Giacalone and Joseph Arnao. The jury found Joey Arnao guilty of the crimes charged in Counts One through Four, and not guilty on Counts Five through Seven. The defendant DePasque was severed from the trial.

On December 15, 1980, a sentencing (Fatico) hearing was conducted before Judge Sweet. The said hearing is the subject of this application for the issuance of a writ of certiorari. On December 22, 1980, Judge Sweet sentenced petitioner Giacalone. At that time, Judge Sweet indicated that he would consider the hearsay evidence presented at the Fatico hearing of petitioner Giacalone's alleged involvement in organized crime. Petitioner was sentenced to five years imprisonment on Count One to be followed by one year of imprisonment on Count Five, and to be served concurrently with six years' imprisonment on Counts Ten and Thirteen. On Counts Six, Seven, Eight, Nine, Eleven, Twelve, Fourteen, Fifteen and Sixteen, the Court sentenced petitioner to concurrent terms of probation of three years, to follow the imprisonment. Committed fines, totalling $85,000, were also imposed on petitioner.

On December 22, 1980, Judge Sweet

sentenced Joseph Arnao on Counts One, Two and Three, to concurrent terms of imprisonment of three and one-half years. On Counts Four, Five, Six and Seven, he was sentenced to three years of probation to follow imprisonment. Judge Sweet imposed committed fines amounting to $24,000 on Joseph Arnao. The defendant Joey Arnao was sentenced to concurrent terms of two years' imprisonment on Counts One, Two and Three, to be followed by three years' probation imposed on Count Four. Committed fines totalling $21,000 were also imposed on Joey Arnao. As mentioned, supra, the defendant Anthony DePasque was severed from the trial because of health reasons. Recently, however, he entered pleas of guilty to certain counts of the Indictment and received a custodial term of three and one-half years and a $10,000 uncommited fine.

A. The Sentencing (Fatico) Hearing.

As indicated, a sentencing hearing was held on December 15, 1980. Julian Wilsey,

a representative of the Office of the New Jersey State Attorney General, testified that an investigation of other individuals (petitioner was not charged), revealed that petitioner was seen in a public area with one Andrew Gerardo, identified by Wilsey as a member of organized crime. It should be noted that the state investigation encompassed a period of years and that Gerardo had a legitimate electrical contracting business. Mr. Wilsey also testified that out of the thousands of conversations recorded through means of electronic surveillance, there was mention of the name Giacalone in a conversation between one Angelo Sica and an Anthony Russo (who at the time of the hearing was deceased). Sica was not called as a witness at the Fatico hearing. Mr. Wilsey admitted at the hearing that Anthony Russo, referred to above, was classified as a liar at another trial by a Government witness and in fact the same Russo had been convicted of perjury. At one point, Russo

referred to a "what the hell's his name -- Giacalee, Giacalone." There was not even an indication that the "Giacalone" mentioned on the tapes played at the hearing was the petitioner. Paul Bertelli, an F.B.I. agent, testified that he had seen petitioner at a prominent and well-known restaurant in Newark, New Jersey, at the time that a birthday celebration was taking place for Andrew Gerardo. Petitioner resided all of his life in the Essex County area where the restaurant was located. Testimony was adduced from two F.B.I. agents that information had been received from six informants who alleged that petitioner was connected with organized crime. In fact, there was even double hearsay elicited in that one agent testified that another agent told him what an alleged informant had said. There was no identification of any of the six alleged informants and of course, no cross-examination. A tape recording of March 22, 1978 was introduced. The same

pertained to an unrelated case in the Northern District of New York, wherein petitioner had previously been convicted, and not the matter at bar. The Government alleged that petitioner had been present for a small part of the conversation. Thereafter, through the hearsay of others, the name "Tony" was mentioned, which the Government alleged referred to the petitioner. Once again, the speaker was not a witness at the hearing and there was no opportunity to cross-examine and confront the speakers. It is important to note that in any event, the said tape did not impute "organized crime" status to petitioner. The Government acknowledged that it had no information about petitioner being involved in specific activities regarding violence.

REASONS FOR GRANTING THE WRIT.

The decision of the Second Circuit in affirming the sentencing hearing, as it affects the petitioner, Giacalone, raises an important question and problem of concern

to this Honorable Court:

(1) Can a proper determination be made strictly on hearsay evidence in the administration of criminal justice in the Federal courts as to a defendant's alleged involvement with organized crime, thereby increasing the defendant's sentence and additionally changing the defendant's offender status in regard to parole consideration.

(2) The proper interpretation and application of the right to due process as embodied in the Fifth Amendment to the United States Constitution and the Sixth Amendment right of confrontation of witnesses in a sentencing hearing in the Federal courts.

These factors combine to make appropriate the grant of this petition for writ of certiorari as the following considerations demonstrate.

1. The Second Circuit's permissive attitude toward the use of prejudicial hearsay testimony at sentencing hearings is destructive

of the right of due process and the right of confrontation of witnesses.

It is respectfully submitted that the only evidence presented against petitioner at the sentencing hearing in this matter (which allegedly connected him to organized crime) was hearsay -- exclusively hearsay. No party so designating petitioner took the stand, and accordingly, petitioner was denied his rights of due process and confrontation under the Fifth and Sixth Amendments respectively. Without cross-examination of the allegations, there could be no fair hearing. Yet, the Second Circuit permitted such a proceeding.

It is acknowledged that Fed. R. Evid. 1101(d)(3) indicates that generally the rules of evidence do not apply to sentencing proceedings, with the exception of privileges. It is recognized that pursuant to 18 U.S.C. §3577, there is no limitation placed on information considered for the purpose of sentencing. It is submitted,

however, that the aforesaid provisions only permit the admission of hearsay, subject to the Fifth Amendment right to due process and the Sixth Amendment right of confrontation clause limitations and their implications. The credibility of the informant and the reliability of the information cannot be meaningfully tested unless there is cross-examination or the introduction of extrinsic regarding the informant.

The Second Circuit relied upon United States vs. Fatico, 579 F.2d 707 (2nd Cir. 1978);603 F.2d 1053 (2nd Cir. 1979), cert. denied, 444 U.S. 1073 (1980) in affirming the conduct of the sentencing hearing in this matter. It is respectfully submitted that this Court should review the doctrine set forth in Fatico and determine once and for all the scope of the confrontation clause at sentencing hearings. In this matter, however, the Second Circuit went way beyond Fatico, into an unprecedented area. In

Fatico, the Court recognized that informants' hearsay declarations must be corroborated by other means. In Fatico, two witnesses, Montello and Llanget (two co-conspirators) testified at the sentencing hearing as to the organized crime involvement of the Faticos. They even offered information as to a so-called "sitdown" of the Faticos with an alleged organized crime boss, one Aniello Dellacroce. Thus, at the hearing, there was present the right of confrontation and the ability to cross-examine at least some of the witnesses. No such opportunity existed in petitioner's case. In effect, petitioner was denied his right of the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution. How can defense counsel counteract hearsay? How can counsel cross-examine an unknown person? The Second Circuit in Fatico emphasized the fact that the hearsay must be corroborated. However, in the case at bar,

there was no corroboration and yet the Second Circuit affirmed and gave its countenance to the "hearing". In fact, in Fatico, there were seventeen different informants, incriminating surveillance(e.g., Fatico ran operations out of a club associated with organized crime) and the Court emphasized the nature of the charges.

The Second Circuit in Fatico placed great emphasis on Williams vs. New York, 337 U.S. 241, 252 n. 18, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), relying on the proposition that it is not a denial of due process to rely upon hearsay. In that case, all of the facts were revealed to counsel in open court. And, in Williams, the sentencing court was not asked to afford the defendant a chance to refute or discredit any of the statements by cross-examination or otherwise. 337 U.S. at 244, 69 S.Ct. at 1081. The confrontation question thus remained open. The petitioner herein disputed the truth of the statements sought to be introduced and also asked

for the right of cross-examination. It is submitted that Gardner vs. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), qualified Williams. In Gardner, this Court held that a defendant cannot be sentenced to death based upon secret information in a presentence investigation report which he cannot dispute or explain because the same was not disclosed to him. In Gagnon vs. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), this Court held that due process requires that a prisoner in a probation revocation situation be permitted to confront and cross-examine adverse witnesses. Similarly, in a parole situation, is Morrissey vs. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484, (1972). In United States vs. Weston, 448 F.2d 626, 634 (9th Cir. 1971) cert. denied, 404 U.S. 1061, 92 S.Ct. 748, 30 I.Ed.2d 749 (1972), the Ninth Circuit held that due process was infringed by the reliance on narcotics agents' statements partially supported by a

confidential informant's report. It is submitted, also, that the purpose of the 1975 amendment to Fed. R. Crim. P. 32(c)(3)(A), requiring mandatory disclosure to defendant or his counsel of presentence reports reflects the importance of reliable information as a basis of proper sentencing.

In United States vs. Bass, 175 U.S. App. D.C., 282, 292, 535 F.2d 110, 120 (1976), United States vs. Needles, 472 F.2d 652, 657-658 (2nd Cir. 1973), and Weston, supra, it washeld that the reliability of evidence that is difficult to challenge must be ensured through corss-examination or otherwise, by demanding certain guarantees of reliability. There must be, in essence, substantial corroboration by the Government. In this case, there was no corroboration of the hearsay declarations.

Important liberty interests are at stake at the time of sentencing. When a person receives an additional period of incarceration, not for the crime which he

has been convicted of, but for some extrinsic reason, he should be afforded all of the constitutional protections. In fact, the potential irreparable effect is compounded by the effect that an "organized crime" determination can have in the classification of a person as a special offender in the prison system. See Cardaropoli vs. Norton, 523 F.2d 990 (2nd Cir. 1975).

Co-defendant DePasque received a three and one-half year sentence in this matter and an uncommitted fine, despite the fact that he was the most culpable individual in the scheme. Joseph Arnao, who had substantial involvement, and Joey Arnao, received substantially lighter sentences than petitioner. Both Joseph Arnao and DePasque had prior records, as did petitioner. The petitioner received a six year sentence solely because of the hearsay presented at the Fatico hearing. There is absolutely no reason why petitioner should have received a longer custodial term than DePasque.

Thus, the damage caused at a "hearing" lacking confrontation is evident. It is bad enough to have a substantial disparity in sentencing, but when the same is based exclusively on hearsay, something is constitutionally amiss. There were no inculpatory facts corroborating the hearsay. The right of confrontation and cross-examination in trial situations has been expressly stated by this Court in Pointer vs. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065; California vs. Green, 339 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489(1970). In Pointer, at page 404, this Court stated:

> "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case."

The same language and logic is appropos to a sentencing hearing such as the one at bar. Emphasizing again the absolute

necessity of thorough and effective cross-examination, this Court stated in Pointer:

> "There are very few subjects, perhaps upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

In Dutton vs. Evans, 400 U.S. 70, 26 L.Ed.2d 213, 91 S.Ct. 210, this Court stated as follows:

> "The argument seems to be rather, that in any given case, the Constitution requires a re-appraisal of every exception to the hearsay rule no matter how long established in order to determine whether, in the words of the Court of Appeals, it is supported by 'salient' and 'cogent' reasons."

The decision below allowing the uncorroborated hearsay deals with a very fundamental aspect of the right of confrontation and due process. The Second Circuit erred in holding in this matter that the hearsay was corroborated by surveillance

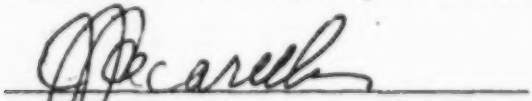
pictures and taped recordings. The photographs were innocuous and not incriminating. The tapes were also hearsay and non-corroborative of organized crime involvement. The decision below affords an opportunity on review for this Court to develop the standard of due process and confrontation mandated by the Constitution in sentencing hearings. A man's liberty is dependent on such a proper evaluation.

CONCLUSION

For the various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

For The

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of May one thousand nine hundred and eighty-one.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE JAMES L. OAKES,

HONORABLE JON O. NEWMAN,

Circuit Judges.

UNITED STATES OF AMERICA, 80-1480
80-1481
80-1033

Appellee.

vs.

80-1480

ANTHONY GIACALONE, JOSEPH ARNAO, (dob: 7/11/37), and JOSEPH ARNAO, (dob 8/3/41),

Defendants-Appellants.

N.B. Since this statement does not consitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they are hereby affirmed.

1. The Government's presentation of testimony and information to the January 1979 and June 1980 grand juries that returned the challenged indictments in this case was proper in all respects. The prosecutor elicited testimony from witness Joseph Lubin indicating that statements made to a previous

grand jury were incorrect. No misconduct occurred because the prosecutor informed the grand jury of this previous perjurious testimony, United States v. Basurto, 497 F.2d 781, 784 (9th Cir. 1974); United States v. Gallo, 394 F.Supp. 310,315 (D. Conn. 1975), and cautioned it to scrutinize carefully his remarks. Moreover, since the June 1980 Additional Grand Jury which presented a superseding indictment was instructed that it could call live witnesses, its decision to rely on the prosecutor's hearsay account of the evidence previously obtained by another panel was not improper. United States v. Schleslinger, 598 F.2d 722 (2d Cir.), cert. denied 444 U.S. 880 (1979).

2. All material exculpatory evidence was disclosed in a timely fashion to defendants, as is required by Brady v. Maryland, 373 U.S. 83 (1963). Judge Sweet properly found that the grand jury testimony of Manny Yglesias was not exculpatory. Alternatively, in light of all evidence presented

at trial, this material, as well as information regarding the reduction of Helen Lubin's sentence, did not create a reasonable doubt that would otherwise not exist. Ostrer v. United States, 577 F.2d 782, 786 (2d Cir. 1978), cert. denied 439 U.S. 1115, (1979), citing United States v. Agurs, 427 U.S. 97, 112-13 (1976).

3. In light of defendant's aggressive cross-examination of JosephLubin, the Government's re-examination constituted permissible rehabilitation of the witness. See United States v. Arroyo-Angulo, 580 F.2d 1137, 1146 (2d Cir.), cert. denied 439 U.S. 913 (1978); 3 Weinstein's Evidence P.607[08] (1978).

4. Because the Government may ask the jury to draw inferences fairly suggested by the defendant, United States v. Suarez, 588 F.2d 352, 354 (2d Cir. 1978), and because Judge Sweet's curative instructions informed the jury that counsel's views on the preparation of the case should be

disregarded United States v. Rapoport, 545 F.2d 802, 804 (2d Cir. 1976), cert. denied, 430 U.S. 931 (1977), we reject defendant's claim that the Government's summation was improper.

5. Judge Sweet did not abuse his broad discretion in refusing to hold a post-trial hearing and in declining to remove two jurors accused of trivial misconduct. United States v. Barnes, 604 F.2d 121, 144 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980).

6. We are satisfied that Judge Sweet did not err in considering hearsay evidence of defendant Giacalone's involvement in organized crime at his sentencing hearing because this evidence was corroborated by surveillance pictures and taped recordings. United States v. Fatico, 579 F.2d 707 (2d Cir. 1978); 603 F.2d 1053 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980). Moreover, the double jeopardy clause of the Fifth Amendment was not violated where Judge Sweet

recalled Giacalone several hours after imposing sentence to inform him that his sentence was to be served consecutively with the sentence currently being served for another conviction. United States v. Davidson, 597 F.2d 230, 230-33 (10th Cir.), cert. denied 444 U.S. 861 (1979); United States v. DiLorenzo, 429 F.2d 216, 221 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971).

7. We have examined defendants' other claims raised in this appeal and find them to be without merit.

The mandate shall issue forthwith.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN

/s/ James L. Oakes
JAMES L. OAKES

/s/ Jon O. Newman
JON O. NEWMAN, Circuit Judges.

Opposition

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in imposing sentence, the district court properly considered hearsay evidence of petitioner's involvement in organized crime.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1981. The petition for a writ of certiorari was filed as of July 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of using international wire facilities to further the distribution of embezzled bank funds, in violation of 18 U.S.C. 1343 (Counts V-IX); transporting, receiving and distributing stolen funds, in violation of 18 U.S.C. 2314

and 2315 (Counts X-XVI); and conspiracy, in violation of 18 U.S.C. 371 (Count I). Petitioner was sentenced to five years' imprisonment on Count I, to be followed by one year's imprisonment on Count V, and to concurrent six-year terms of imprisonment on Counts X and XIII. In addition, petitioner received concurrent terms of three years' probation on Counts VI, VII, VIII, IX, XI, XII, XIV, XV and XVI and was fined $85,000. The court of appeals affirmed (Pet. App. 2a).

1. Briefly summarized, the evidence at trial, the sufficiency of which is not contested, showed that petitioner, co-defendants Joseph and Joey Arnao, and others used foreign wire facilities to distribute $3,000,000 embezzled from a New York branch of Citibank in August 1976. The $3,000,000 embezzlement was accomplished when Citibank employee John Palacio sent a wire transfer of $3,000,000 to a bank account opened by Joseph Arnao at First Curacao International Bank, Curacao, Netherlands Antilles. Thereafter, petitioner and co-conspirator DePasque arranged for the embezzled money to be washed through Canadian, Swiss, and New York bank accounts and ultimately distributed to the co-conspirators. Petitioner, Joseph Arnao, and Joey Arnao each received over $400,000 from the embezzlement. The evidence at trial additionally showed petitioner's participation in an attempted scheme to embezzle another $5,000,000 to $7,000,000 from Citibank in October 1976.

2. Following petitioner's conviction, the government submitted a presentencing memorandum to the court on December 5, 1980, which described petitioner as a member of an organized crime family. The memorandum asserted that petitioner was a "made" man or soldier in the Genovese

crime family.[1] It described his participation in illegal activities involving bookmaking, loan-sharking and trafficking in stolen goods. Petitioner contested the memorandum's characterization of his activities, and, consequently, the court held an evidentiary hearing.

During the hearing, the government introduced a tape recording of a conversation between Anthony Russo and Angelo Carmen Sica, which had been electronically monitored pursuant to a court order (Tr. 395).[2] Both these individuals were "made" men of the Genovese crime family (Tr. 379, 381). On tape, Russo discussed the Genovese family's criminal activities. Russo explicitly acknowledged that petitioner, who formerly worked under Sica, had been "made" as a result of Sica's sponsorship (Tr. 393-395; HGX 8, 8-1, 8-3, 8-4). A second tape-recording, also played during the hearing, featured a conversation between petitioner, Anthony DePasque, and an undercover FBI agent (Tr. 477; HXG 9). In this tape, petitioner himself described his bookmaking activities and his dealings in stolen goods (HGX 9).

In addition to the tapes, the government presented surveillance photographs showing petitioner with organized crime figures (Tr. 463-464). An FBI agent also testified that he observed petitioner at a party attended by members of the Genovese crime family (Tr. 412-414). Two other FBI agents testified that six reliable informants had stated that petitioner was a "made" man in organized crime (Tr. 428-429, 456-462).

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[1] A "made" member or soldier is "one who has officially been initiated as a full-fledged member of [an organized crime] family, not born into it but not merely associated with it." *United States* v. *Fatico*, 603 F. 2d 1053, 1055 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980).

[2] "Tr." refers to the transcript of the sentencing hearing held on December 15, 1980; "HGX" refers to the exhibits introduced by the government at that hearing.

ARGUMENT

Petitioner contends that the sentencing proceeding deprived him of due process because he was not afforded an opportunity to cross-examine the confidential informants whose information was conveyed through the testimony of the FBI agents (Pet. 10-11) and because the hearsay evidence was not sufficiently corroborated to be admitted at the sentencing proceeding (*id.* at 13-14). These contentions do not merit review by this Court.

1. Although due process considerations apply at sentencing, due process does not prohibit the use of hearsay evidence at a sentencing proceeding or require that a convicted defendant be allowed to cross-examine the source of such information. See *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) (plurality opinion); *United States* v. *Fatico*, 579 F. 2d 707, 711 (2d Cir. 1978) (*Fatico* I); 603 F. 2d 1053, 1054 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). "[O]nce the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and to the convicted person's life and characteristics." *Williams* v. *Oklahoma*, 358 U.S. 576, 584 (1959). As the Court explained in *Williams* v. *New York*, 337 U.S. 241, 247, 249-250 (1949) (footnotes omitted):

> A sentencing judge * * * is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the

> fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.
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> To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination.

See also *United States* v. *Grayson*, 438 U.S. 41, 49 (1978). Thus "before making [the sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972), quoted in *United States* v. *Grayson, supra*, 438 U.S. at 50.[3] These views are embodied in 18 U.S.C. 3577, which provides:

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[3]Although petitioner argues otherwise (Pet. 15), the plurality opinion in *Gardner* v. *Florida, supra*, in no way curtails the scope of this Court's holding in *Williams* v. *New York, supra*. In *Gardner*, it was recognized that "[t]he fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights" (430 U.S. at 358 n.9). Furthermore, since *Gardner*, this Court in *United States* v. *Grayson, supra*, 438 U.S. at 50, has reaffirmed the continuing validity of *Williams*.

Beyond this, we note that *Williams* and the instant case are distinguishable from *Gardner* in two important respects. In *Gardner*, the trial court failed to disclose the substance of the hearsay evidence. Here, as in

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

This statute unequivocally authorizes the sentencing procedures employed in petitioner's case.

This Court and the courts of appeals have uniformly held that a sentencing judge may consider hearsay evidence that the defendant was associated with organized crime or was a ringleader in extensive criminal activity, that he constituted a danger to society, or that he had committed unrelated crimes for which he has not been convicted.[4] Due process is satisfied where the court determines that the hearsay evidence is reliable and the defendant is given the opportunity

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Williams, "the material facts * * * which are contained in the presentence report were described in detail by the trial judge in open court." *Gardner, supra*, 430 U.S. at 356. Moreover, the decision in *Gardner* seems limited to capital cases. See 430 U.S. at 357-358; see also *Presnell* v. *Georgia*, 439 U.S. 14, 16 (1978) ("These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial *in a capital case* than they do in the guilt-determining phase of any criminal trial. Cf. *Gardner* v. *Florida*, 430 U.S. 349 (1977)") (emphasis added).

[4]Williams v. *New York, supra*, 337 U.S. at 244 (information that defendant had committed 30 burglaries for which he had not been convicted and that he was a "menance to society"); *Farrow* v. *United States*, 580 F. 2d 1339, 1353-1354 n.25, 1359-1360 (9th Cir. 1978) (information that defendant was the ringleader of a large narcotics operation); *United States* v. *Wondrack*, 578 F. 2d 808, 809-810 (9th Cir. 1978) (report that defendant convicted of attempted tax evasion had received substantial income from trafficking in narcotics); *United States* v. *Ashley*, 555 F. 2d 462, 466 (5th Cir.), cert. denied, 434 U.S. 869 (1977) (information regarding defendant's prior conduct); *United States* v. *Cardi*, 519 F. 2d 309, 313 (7th Cir. 1975) (information regarding defendant's associates, sources of income, and prior criminal conduct); *United States* v. *Needles*, 472 F. 2d 652, 657-658, 659 (2d Cir. 1973) (report that defendant was engaged in widespread manufacture and sale of firearms).

to rebut the accuracy of the information. However "[t]he right of rebuttal does not require that the sentencing hearing be transformed into a second trial. * * * At a minimum, it is sufficient if the sentencing judge affords the defendant an opportunity to 'comment on any alleged factual inaccuracies.' " *United States* v. *Barnett*, 587 F. 2d 252, 259-260 (5th Cir. 1979), cert. denied, 441 U.S. 923 (1979) (citations omitted). See also Fed. R. Crim. P. 32(c)(3)(A) ("the court shall afford the defendant or his counsel an opportunity to comment [on the presentence report] and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report").[5]

Moreover, there was a compelling reason in this case to allow the use of hearsay evidence. To have required the confidential informants to appear for cross-examination by petitioner would have ignored the strong societal interest in protecting the safety and anonymity of such informants. The danger of retaliation against persons who provide information concerning alleged organized crime figures is especially acute. These considerations are recognized in Fed. R. Crim. P. 32(c)(3)(A), which, as amended in 1974, provides that the defendant or his counsel shall be allowed to read the presentence report, "but not to the extent that in

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[5] *United States* v. *Weston*, 448 F. 2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972), on which petitioner relies (Pet. 15-16), is not to the contrary. Unlike the hearsay evidence in this case, the court in *Weston* found that the hearsay statements at issue there were uncorroborated and unverified (448 F. 2d at 630-631) and that "the factual basis for believing the * * * [hearsay evidence] was almost nil" (*id.* at 633). The Ninth Circuit has expressly limited *Weston* to "a sentence explicitly based upon unverified, unreliable charges of very serious criminal conduct." *Farrow* v. *United States*, 580 F. 2d 1339, 1358 (9th Cir. 1978). See also *United States* v. *Wondrack*, 578 F. 2d 808, 809 (9th Cir. 1978) (under *Weston*, a "sentence may be reviewed and vacated when it is premised on allegations of serious criminal conduct and the 'factual basis for believing the charge [is] almost nil' ").

the opinion of the court the report contains * * * any * * * information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons." In this context, there is particular force to the concern "that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination." *William* v. *New York, supra*, 337 U.S. at 250.

2. Petitioner asserts (Pet. 13-14) that the government failed to corroborate the testimony of two FBI agents that six informants had described him as a "made" man in the Genovese crime family. See *United States* v. *Fatico, supra*, 579 F. 2d at 712-713; 603 F. 2d at 1056.[6] The court of appeals correctly held, however, that "[the trial court] did not err in considering hearsay evidence of [petitioner's] involvement in organized crime at his sentencing hearing because this evidence was corroborated by surveillance pictures and taped recordings" (Pet. App. 5a). These recordings described petitioner as a "made" man while detailing his extensive criminal activities, and the photographs showed him with known organized crime figures. Moreover, the government produced the in-court testimony of an FBI agent who had observed petitioner at a party attended by

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[6]The *Fatico* I court held that "Due Process does not prevent use in sentencing of out-of-court declarations by an unidentified informant where there is good cause for the nondisclosure of his identity, and there is sufficient corroboration by other means" (579 F. 2d at 713 (footnote omitted)). In *Fatico*, the court found hearsay evidence to be sufficiently corroborated by the testimony of two co-conspirators, the nature of the crime itself (armed hijacking of valuable cargo requiring sophisticated fencing through quasi-legitimate and criminal business groups), and the in-court testimony of those who saw the defendant associating with members of an organized crime family (603 F. 2d at 1057). The court did not, however, limit the allowable means of corroboration to those found under its own facts (*ibid.*).

members of the Genovese crime family. Accordingly, the government more than amply corroborated the information supplied by the undisclosed informers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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